FEB 28 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1327

ALEXANDER HAMILTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner Alexander Hamilton respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 29, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not to be reported, appears in the Appendix hereto. The judgment of conviction entered by the United States District Court

for the District of Nevada following a trial by jury, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 29, 1974. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the Trial Court committed prejudicial and reversible error in limiting Petitioner's inquiry directed toward establishing his lack of predisposition to participate in the illicit transaction.

STATUTE INVOLVED

Title 21, United States Code, Section 841(a)(1).

The text of the Statute appears in the Appendix hereto.

STATEMENT OF THE CASE

The Petitioner, Alexander Hamilton, and one Larry Narlock, were indicted by a Federal Grand Jury in Las Vegas, Nevada, on March 1, 1973.

The Petitioner, Alexander Hamilton, (hereinafter referred to as Hamilton) and Narlock were tried before the Honorable Roger D. Foley, with a jury, from May 8, 1973, through May 10, 1973, on two counts of the indictment charging "Distribution of Controlled Substance," Count I (21 U.S.C. 841(a)(1)), and "Possession of Controlled Substance With Intent to Distribute," Count II (21 U.S.C. 841(a)(1)).

The basic facts of the case as related by the Government witnesses were not controverted to any great extent during the course of the trial. The Government contended that Hamilton and Narlock acted in concert for the purpose of transacting the sale of cocaine to an undercover agent, one Orduno; the two defendants did not controvert the basic fact pattern as to how the transactions appeared to the Government witnesses but rather maintained through their testimony that Narlock was an "agent provocateur" and Hamilton was entrapped as his "dupe."

The Government presented evidence to the effect that Undercover Deputy Sheriff Orduno approached Narlock prior to February 24, 1973, and discussed the purchase of a quantity of cocaine with him. That on February 24, 1973, Narlock and Hamilton had given a sample of cocaine to Orduno, i.e., Count I, the same having been taken from Hamilton by Orduno, for which Narlock received some one thousand dollars. On February 25, 1973, Orduno received a call from Narlock advising him that a pound of cocaine was available and a sale could be consummated that day. Later in the afternoon of February 25, 1973, Hamilton and Narlock were arrested in a motel room with fifteen ounces of cocaine, prior to the actual transfer of monies taking place, i.e., Count II.

The Defense urged that Narlock was offered "a deal" to entice the entrapment of narcotic traffickers in order to alleviate pressures on himself, such as being arrested for the sale of cocaine to Orduno on February 7, 1973, and having an Arizona probationary term revoked; that Narlock constantly called Hamilton between February 7, and February 24, 1973, in an effort to elicit his aid for personal problems without advising Hamilton of his specific involvement in narcotics; that Narlock thought of Hamilton as being the ideal victim for his prey since Hamilton was in the "Super-Fly" image; that it was not

until February 24, 1973, that Hamilton became aware of Narlock's arrangement with Orduno while he accompanied Narlock on for purposes of protecting him should Orduno turn on him, as was represented as a possibility by Narlock; that Narlock was supplied with the contraband by the Government; that once Hamilton became enmeshed in the transaction on behalf of Narlock, he followed through at Narlock's behest and insistance based on friendship during the transaction of February 25th. Narlock took the stand and related the foregoing.

Hamilton testified primarily to the same set of facts.

In addition, Hamilton offered testimony of character witnesses as well as witnesses who were asked to testify as to their opinion of Hamilton's predisposition to be engaged in illicit narcotic transactions. The Trial Judge permitted general questions as to character reputation in the community, but would not permit inquiry designed to show Hamilton's lack of predisposition for the activity charged in the indictment.

In instructing the jury the Court gave the standard entrapment instruction but failed, over Hamilton's objection, to give an instruction which would characterize Narlock as a police agent thus providing Hamilton with the predicate on which to base the defense of entrapment.

The jury found Hamilton and Narlock guilty on both counts, and the Court entered judgment and imposed its sentence, following denial of the defendant's motion for judgment of acquittal and motion for new trial. Hamilton was remanded to custody, but subsequently was released on bond pending the appeal to the Ninth Circuit Court of Appeals.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed Petitioner's conviction. On February 19, 1974, the Court of Appeals stayed the

issuance of the mandate and Petitioner remains at liberty on his appeal bond.

REASON FOR GRANTING THE WRIT

THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR IN LIMITING PETITIONER'S INQUIRY DIRECTED TOWARD ESTABLISHING HIS LACK OF PREDISPOSITION TO PARTICIPATE IN THE ILLICIT NARCOTIC TRANSACTIONS.

In his attempt to satisfy the entrapment defense criteria as set forth in *United States v. Russell*, ___U.S.___ 93 S.Ct. 1637 (1973), as to negating elements of predisposition of Petitioner to participate in the illegal venture, Petitioner summoned seven witnesses who would have testified because of their particular relationships with Petitioner, their opinion would be that he was not the type of person who would be engaged in narcotic transactions.

The Trial Judge limited the inquiry to the standard character evidence questions relating to the Petitioner's reputation in the community for truth, veracity, honesty and integrity.

It is submitted that the Trial Court erred in not permitting Petitioner to present witnesses' testimony that would have been, in view of Petitioner's entrapment defense, ". . . [a]n appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells v. United States*, 287 U.S. 435, 451, 53 S.Ct. 210, 216 (1932).

In *Russell, supra*, this Honorable Court held that Russell's concession in the Court of Appeals as to his predisposition was fatal to his claim of entrapment.

In *Russell, supra*, this Honorable Court held that the

principal element in the defense of entrapment is the Defendant's predisposition to commit the crime and therefore, Russell's concession in the Court of Appeals as to his predisposition was fatal to his claim of entrapment. As characterized by the opinion of Justice Rehnquist, speaking for the majority, in order to have proved the Petitioner herein an "unwary innocent" rather than an "unwary criminal," ___U.S.___, 93 S.Ct. at 1645, the predisposition line of inquiry was necessary, and for the Trial Court to have prevented the same is tantamount to having deprived the Petitioner of his defense of entrapment.

CONCLUSION

For the reason stated, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

OSCAR B. GOODMAN, Esquire
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101

Attorney for Petitioner

ALEXANDER HAMILTON

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed this ___ day of February, 1974, postage prepaid, to the Honorable ROBERT BORK, Solicitor General, U.S. Department of Justice, Washington, D.C. 20530.

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ALEXANDER HAMILTON, *Defendant-Appellant.*	Criminal No. 73-2582 MEMORANDUM

[January 29, 1974]

Appeal from the United States District Court for the District of Nevada

Before: BROWNING and WALLACE, Circuit Judges, and WILLIAMS,* District Judge.

Appellant was convicted of two violations of 21 U.S.C. § 841(a)(1): possession of cocaine with the intent to distribute and distribution. He raises three claims on this appeal all without merit.

(1) His failure to either allege or show that he was prejudiced by the trial judge's substitution of an alternate for a regular juror pursuant to Federal Rules of Criminal Procedure 24(c) forecloses his contention that it constituted an abuse of discretion: *United States v. Ellenbogen*, 365 F.2d 982 (2d Cir. 1966); *United States v. Zambito*, 315 F.2d 266 (4th Cir. 1963).

(2) The trial judge properly limited the testimony from appellant's character witnesses. Furthermore, since appellant did not object to the limitation and made no offer of proof, he is precluded

*Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

from raising the point for the first time on appeal. *Walker v. Continental Life & Accident Company*, 445 F.2d 1072 (9th Cir. 1972).

(3) Finally, the entrapment instruction given was complete and proper. Appellant's offered instruction was superfluous and correctly rejected. See *United States v. Russell*, 411 U.S. 423 (1973).

Affirmed.

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JUDGMENT AND COMMITMENT (R. 2-68) Cr. Form No. 25

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DEPUTY

United States District Court

FOR THE DISTRICT OF NEVADA

ENTERED

JUL 3 1973

CLERK, U.S. DISTRICT COURT DISTRICT OF NEVADA BY DEPUTY

United States of America

v.

ALEXANDER HAMILTON

No. Criminal-LV 2655

On this 29th day of June, 1973 came the attorney for the government and the defendant appeared in person and[1] with counsel, Oscar B. Goodman.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of distribution of a controlled substance and possession of a controlled substance with intent to distribute, in violation of Title 21, Section 841(a)(1) of the United States Code,

as charged[1] in counts 1 and 2 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[1] THREE (3) YEARS as to count I and THREE (3) YEARS as to count II. In addition to such term of imprisonment, there is imposed a special parole term of FIVE (5) YEARS.

IT IS ADJUDGED that[1] the sentence imposed as to count 2 is to run concurrent with the sentence imposed as to count 1.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to[1]

United States District Judge.

JOHN A. PORTER, CLERK

By: [illegible], Jr., Deputy *Clerk.*

[1] Insert "by [name of counsel], counsel" or "without counsel"; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel; (2) "guilty" or "not guilty"; (3) "and a verdict of guilty," or (4) "and a finding of guilty," or (5) "and the court having found [illegible]"; (6) "and no cause was shown," or "and the defendant showed no cause why [illegible]"; (7) "and no sufficient cause to the contrary was shown or appeared to the court"; (8) "and no sufficient cause to the contrary being shown or appearing to the court"; (9) "and no sufficient cause to the contrary being shown or appearing to the court, and no motion for a new trial having been made"; (10) "and no motion for a new trial having been made"; (11) "and no motion for a new trial having been made within the time required by the rules of this court"; (12) "and no motion for a new trial having been made within the time required by the rules of this court, and no motion in arrest of judgment having been made within the time required by the rules of this court"; (13) "and no motion for a new trial having been made within the time required by the rules of this court, and no motion in arrest of judgment having been made within the time required by the rules of this court, and no motion for extension of time having been made within the time required by the rules of this court"; (14) "and no motion for a new trial having been made within the time required by the rules of this court, and no motion in arrest of judgment having been made within the time required by the rules of this court, and no motion for extension of time having been made within the time required by the rules of this court, and no motion for extension of time having been made within the time required by the rules of this court, and no motion for extension of time

PART D.–OFFENSES AND PENALTIES

§841. Prohibited acts A–Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of

imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have

become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Pub.L. 91–513, Title II, §401, Oct. 27, 1970, 84 Stat. 1260.

No. 73-1327

MAR 5 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALEXANDER HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1327

ALEXANDER HAMILTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSTITION

Petitioner contends that the trial court erred in excluding unsupported opinion evidence, offered without a foundation, that he was not predisposed to dealing in narcotics.

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of distribution of cocaine and of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a). He was sentenced to concurrent terms of three years' imprisonment and five years of special parole. The court of appeals affirmed (Pet. App. A).

In February 1973, co-defendant Larry Narlock agreed to procure cocaine for undercover agent Ralph Orduno from a gaming dealer on the Las Vegas "Strip" named "Alex." (Tr. 131, 565-566) At the time petitioner was employed as a dealer on the Strip (Tr. 433-434). On

February 24, 1973, Narlock advised Orduno that he would sell cocaine for $1,000 an ounce (Tr. 60-62). Petitioner accompanied Narlock when Orduno met with him to examine the cocaine, and petitioner offered Orduno a sample of the cocaine (Tr. 60, 63). Orduno said he would have to "check it out" (Tr. 63-64). He submitted the substance for testing, then returned and paid petitioner and Narlock $1,000 for one ounce of the cocaine (Tr. 69-70). Petitioner also told Orduno he could get him a pound of cocaine the next day (Tr. 73).

The next day, February 25, Narlock called Orduno and told him the additional cocaine was ready (Tr. 74). Narlock and petitioner arrived at the place of rendezvous, showed Orduno the fifteen ounces of cocaine and were arrested. (Tr. 81-82).

Petitioner did not dispute the facts given above, but contended that he was entrapped. On cross-examination, petitioner testified that on February 25th he had voluntarily brought the narcotics to the room Orduno had specified for their meeting (Tr. 522-525); and that although he knew it was a crime, he nevertheless did so to assist his "close friend" Narlock (Tr. 534-536).

When petitioner's counsel attempted to ask a defense witness whether petitioner "was the type of person who would be engaged in narcotics" (Tr. 401-402), the court upheld the government's objection that counsel could not ask the witness for a personal opinion as to such an ultimate conclusion (Tr. 402). The court said that the rules of evidence allowed him to ask about the defendant's general reputation for good character (Tr. 402). Counsel then asked whether petitioner had a good reputation as a law-abiding citizen, to which the witness responded affirmatively (Tr. 404). Accordingly, the court's ruling

did not prevent counsel from establishing lack of predisposition; it merely reflected the well established principle of evidence that such conclusions are only for the jury to draw from the evidence adduced at trial. See Wigmore, *Evidence* (3rd Ed.), §§ 1981, 1983. See also, *e.g.*, *State* v. *Sinnott*, 24 N.J. 408, 132 A. 2d 298; *Watson* v. *State*, 156 Tex. Cr. R. 585, 244 S.W. 2d 515.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.